SUPREME COURT OF THE UNITED STATES.

No. 268.

JEREMIAH CLARK, FLORINDA CLARK, AND SAMUEL F. FEW, APPELLANTS.

vs.

WILLIAM S. REYBURN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

INDEX.

	Original.	Print
Bill of complaint	1	1
Subpœna	6	3
Return	7	3
Answer	8	4
Exhibit "A," deed of clerk to Few	17	7
Replication	24	10
Plea	26	10
Demurrer	29	12
Answer	32	13
Plea disallowed	33	13
Demurrer overruled	33	13
Leave to compl't to answer bill	34	14
Leave to def't to withdraw answer	34	14
Amended bill	34	14
Subpœna	39	16
Return	41	16
Answer of Few	42	17
Decree	47	19
Appeal	49	19
Allowance	53	21
Appeal bond	55	21
Writ of error	59	22
Clerk's certificate	61	23

1 Pleas before the Hon. Archibald Williams, one of the judges of the circuit court of the United States for the district of Kansas, at a term of the said court, begun and held at Topeka, in said district, on Monday the 13th day of October, A. D. 1862.

No. 14.

WILLIAM S. REYBURN
vs.
FLORINDA CLARK, SAMUEL F. FEW, AND JEREMIAH CLARK. } In equity.

Be it remembered, that on the 2d day of January, A. D. 1862, the complainant herein, by O. B. Holman, esq'r, his solicitor, filed in the office of the clerk of the district court of the United States for the district of Kansas, this bill of complaint herein; which said bill is in words and figures following, that is to say:

Bill.

To the Hon. Archibald Williams, judge of the United States district for the district of Kansas:

William S. Reyburn, a citizen and resident of the State of Pennsylvania, brings this, his bill of complaint, against Florinda Clark and Samuel F. Few, each citizens and residents of the State of Kansas.

2 And thereupon your orator, complaining, says that on the 30th day of April, A. D. 1859, one Jeremiah Clark, the husband of defendant, Florinda Clark, executed and delivered to your orator his promisory note, payable to the order of your orator twelve months after date, for the sum of five thousand two hundred and fifty dollars with interest after maturity, until paid, at twenty-five per cent. per annum; that on the said 30th day of April, 1859, the said Jeremiah Clark, together with the defendant, Florinda Clark, to secure the payment of said note and interest, executed and delivered to your orator, a mortgage conveyance of the following real property, to wit: Block number twenty-two, (22,) in Clark & Rees' addition to the city of Leavenworth, known as "Clark Place," on the plat of said town, with all improvements, which was conditioned for the payment of the principal and interest mentioned in said note; that the said mortgage conveyance was, on the 30th day of April, 1859, duly and legally acknowledged by the said Jeremiah Clark and the defendant, Florinda Clark, his wife, and was, on the 3d day of May, 1859, filed for record in the office of the register of deeds of Leavenworth county, and recorded as a mortgage in book "H" of records, pages 379 and 380, as by said mortgage conveyance, with a certificate of acknowledgment and record endorsed thereon, now ready to be produced as this court may direct, will more fully appear.

2

And your orator, further complaining, says that when the said note became due and payable the said Jeremiah Clark then, and at all times since, has utterly and entirely failed to pay the same or

any part thereof, and that, in this honorable court, on the 25th day of October, 1866, in a certain suit in equity, then and there pending, in which your orator was complainant, and Jeremiah Clark, Florinda Clark, and Samuel F. Few were the defendants, which action was then and there dismissed as to the defendants, Jeremiah Clark and Samuel F. Few, it was by said court decreed that there was due your orator on said note and mortgage, from the said Jeremiah Clark, the sum of eight thousand five hundred and sixty seven dollars and seventy cents, ($8567 70.)

And the said court, in said suit, at said time, also rendered a decree of foreclosure against the said Jeremiah Clark of all and every his interest in said property, and further decreed the sale of the interest of said Clark in said property to satisfy the amount decreed to be due from him to your orator.

4 And your orator, further complaining, says that on the 21st day of December, 1861, in pursuance of said decree, the United States marshal for this district sold to your orator the interest of said Clark in said property for the sum of seven thousand dollars. ($7,000 00;) and that on the 23d day of December, 1861, the said U. S. marshal executed and delivered to your orator a deed of conveyance therefor. And your orator, further complaining, says that there is still due and owing to him of the sum, so as aforesaid, decreed to be due him on said note and mortgage, after deducting the amount by him received on the sale of the said interest of the said Clark, the sum of one thousand eight hundred eighty-four dollars and twenty-five cents, for the payment of which, the interest of the said Florinda Clark in said property, by her conveyed under said mortgage, stands charged. And your orator, further complaining, says that the defendant, Samuel F. Few, under a trust deed from the said Jeremiah Clark and Florinda Clark, his wife, bearing date January 12, 1860, for said property to him in trust, claims to have an interest as a trustee in said property, which interest, if any, your orator charges to be inferior and subsequent to his interest in said property under the said mortgage.

5 Wherefore, your orator prays that it may be adjudged and decreed, that the defendant, Florinda Clark and Samuel F. Few, may be forever foreclosed and barred of any and all interest or claim in or to said property, and every part thereof, and that this court will grant unto your orator such other and further relief as he may be entitled to in equity and good conscience, including his costs in this behalf. And may it please your honors, to grant unto your orator your most gracious writ of subpœna, to be directed to the said Florinda Clark and the said Samuel F. Few, commanding them on a day certain, to be named in said subpœna, to be and appear before your honor and answer unto your orator's bill of complaint.

And your orator, as in duty bound, will ever pray, &c.

O. B. HOLMAN,
Compl't's Sol.

T. A. HURD,
Of Counsel.

And which said bill of complaint is endorsed in words and figures as follows, that is to say:

State of Kansas. U. S. district court. William S. Reyburn, *vs.* Florinda Clark and Samuel F. Few, def'ts. Bill of complaint. O. B. Holman, sol'r for complainant. Filed January 2, 1862. John T. Morton, clerk.

5 Whereupon, there issued from the office of the clerk of said court a written of subpœna, in chancery, in words and figures as follows, that is to say:

UNITED STATES OF AMERICA, *District of Kansas, ss:*

The United States of America to Florinda Clark and Samuel F. Few:

We command you, and every of you, that you appear before our judge of our district court of the United States of America for the district of Kansas, at Topeka, in said district, on the first Monday in the month of February next, to answer the bill of complaint of William S. Reyburn, this day filed in the clerk's office of said court, in said city of Topeka, then and there to receive and abide by such judgement and decree as shall then or thereafter be made, upon pain of judgement being pronounced against you by default.

To the marshal of the district of Kansas to execute.

Witness the Hon. Archibald Williams, judge of our said circuit court at Topeka, aforesaid, this second of January, in the year of our Lord one thousand eight hundred and sixty-two, and of our independence the eighty-sixth.

[SEAL.] JOHN T. MORTON, *Clerk.*

Memorandum.—The above-named defendants are notified that unless they enter their appearance in the clerk's office of said court at Topeka aforesaid, on or before the day to which the above

7 writ is returnable, the complaint will be taken against them as aforesaid, and a decree entered accordingly.

JOHN T. MORTON, *Clerk.*

Which said writ was, and now is, duly endorsed in words and figures following, that is to say:

No. 93. District court United States, district of Kansas. William S. Reyburn *vs.* Florinda Clark and Samuel F. Few. Chancery subpœna. Returnable to rule day, first Monday in February, A. D. 1862. Clerk filed January 10, 1862.

JOHN T. MORTON, *Clerk.*
O. B. HOLMAN, *Comp'ts. Sol.*

And which said writ was afterwards, to wit, on the tenth day of January, A. D. 1862, returned into the clerk's office of the said court

by the marshal of the district of Kansas, with a return of his doings endorsed thereon, in words and figures following, that is to say:

Received this writ January 3d, A. D. 1861. Executed the same by leaving a certified copy of same at the usual residence of Florinda Clark, and of Samuel F. Few, in Leavenworth county, with a member of each of their families over 16 years of age.

Service, 2	$4 00
Mileage, 60	3 60
Total	$7 60

JAMES L. McDOWELL,
U. S. Marshal.

8 And afterwards, to wit, on the 3d day of February, A. D. 1862, the said defendant, Florinda Clark, entered her appearance in this cause.

And afterwards, to wit, on the 3d day of March, A. D. 1862, the said Florinda Clark filed her answer to the said bill of complaint, which said answer is in words and figures following, that is to say:

Answer.

UNITED STATES OF AMERICA,
District of Kansas, ss:

To the Honorable Archibald Williams, judge of the district court of the United States for the district of Kansas, in chancery sitting.

The separate answer of Florinda Clark to the bill of complaint against her, this defendant, and one Jeremiah Clark and Samuel F Few, exhibited by William S. Reyburn.

This defendant now, and at all times hereafter, saving and reserving to herself all benefit and advantage of exceptions which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said bill of complaint contained, for answer thereunto, or unto so much and such parts thereof as this defendant is advised is or are material or necessary for her to make answer unto, this defendant, answering, saith: That as to the charge in said complainant's bill of complaint, that the said defendant, Jeremiah Clark, executed
9 and delivered to said complainant his, Jeremiah Clark's, prommissory note, as in said complainant's bill of complaint mentioned, this defendant says that she knows nothing of her own knowledge, but she has been informed that such prommissory note was so made and executed, and therefore cannot deny such statement.

And as to the charge in said complainant's bill of complaint, that to secure the payment of the sum of money mentioned in said note according to the tenor and effect of the same, that the defendant, Jer-

emiah Clark and Florinda Clark, his wife, duly executed and delivered to complainant, a mortgage on the real estate in complainant's bill of complaint mentioned, with conditions for the payment of the principal and interest mentioned in said note, this defendant denies that she, this defendant, did execute and deliver said mortgage as stated in said complainant's bill of complaint, but she expressly states the fact to be that a mortgage or deed of trust, purporting to be a conveyance from defendant, Jeremiah Clark, and this defendant, the wife of the said Jeremiah Clark, to one Isaac G. Losex, as trustee, for the use and benefit of the said complainant, was, about the time mentioned in said bill of complainant, presented to her, this defendant, for her signature, and that she, this defendant, signed the same, and said instrument passed out of her hands.

10 That after she so signed the same she, this defendant, determined that she would not acknowledge or deliver said instrument of conveyance, and this defendant expressly states the fact to be, that said instrument of conveyance never was presented to her, this defendant, by the said Josiah Kellog, the said notary public, for acknowledgment, or by any notary public, or other officer or person, and that she never did acknowledge the same; and that she never did do any act or thing toward the execution or delivery of said instrument of conveyance, or any other like instrument, or any instrument whatever, conveying the real estate in said bill of complaint mentioned to said complainant, or to any person, to and for the use of the said complainant, or to secure the payment of said prommissory note, except the signing her name to the instrument of conveyance as hereinbefore stated; and this defendant says that said mortgage in said complainant's bill of complaint mentioned, never was duly acknowledged by this defendant, as stated in said complainant's bill of

11 complaint; that as to the filing of said mortgage for record, and as to the same being recorded, as stated in said complainant's bill of complaint, this defendant knows nothing of her own knowledge of any such mortgage being on record as stated, and requires thereof strict proof.

This defendant is informed and believes that a deed, purporting to be deed of trust for the real estate in said bill of complaint mentioned, purporting to be from Jeremiah Clark & wife to one Isaac G. Losee, as trustee, for the use and benefit of said complainant, was about the 3rd day of May, A. D. 1859, filed for record, in the office of the register of deeds of Leavenworth county, and that the same is now of record in said office.

And this defendant says, that the certificate of acknowledgment on the pretended deed of trust from the said Jeremiah Clark and wife to the said Isaac G. Losee, as trustee, for the use and benefit of the said complainant, which said instrument is described in said

12 complainant's bill of complaint, as a mortgage duly executed and delivered to complainant, is untrue in this: that she, this defendant, did not at any time acknowledge said instrument of conveyance to be her voluntary act and deed, and did not at any time acknowledge the same to be her act and deed.

That she, this defendant, was not at any time examined seperate and apart from her said husband by such notary public, or by any other officer, as stated in said certificate. And that she, this defendant, did not at any time relinquish her dower to the land and tenements in said pretended instrument mentioned, voluntarily, freely, and without compulsion or undue influence of her said husband, and that she did not at any time so relinquish her dower.

And as to the charge in said complainant's bill of complaint, that there is due and unpaid on said note and mortgage the whole of said principal and interest, as stated in said bill of complaint, this defendant knows nothing of her own knowledge, and requires thereof
13 strict proof; but this defendant denies that the title to said property has become absolute in the said complainant; and as to the charge in said complainant's bill of complaint, that the said defendant, Samuel F. Few, has, or claims to have, some interest, in or to the said mortgaged premises under a deed of trust from said defendant, Jeremiah Clark and Florinda Clark, which interest, if any, is in said bill stated to be subsequent to the lien of the mortgage of complainant, and subject thereto. This defendant states and charges that the said Jeremiah Clark and Florinda Clark, his wife, did make, execute, and deliver to the said Samuel F. Few a deed of trust, bearing date the 12th day of January, in the year of our Lord 1860, and duly acknowledged before a notary public, in and for the county of Leavenworth, in the Territory of Kansas, on the 14th day of January, 1860, whereby the said Jeremiah Clark and Florinda Clark, his wife, conveyed to the said Samuel F. Few, in trust for the uses
14 and purposes, and for the benefit of the persons in said deed specified, the real estate therein mentioned, to wit: Block number twenty-two, (22,) known as Clark Place, in Clark & Rees' addition to Leavenworth, situate in the county of Leavenworth, in the Territory, now State, of Kansas; that the persons for whose special use and benefit the said real estate was conveyed in trust to the said Samuel F. Few in deed, by the said last mentioned deed, were the said Florinda Clark, and the children of the bodies of the said Florinda Clark and Jeremiah Clark, in being, or to be born, and the legal heirs of said children, and none other, with certain other limitations in relation to the further decent thereof, and to the use, occupation, and disposition of said real estate in said deed, were specifically expressed and stated, as by reference thereto will more fully appear. A copy of which said last-mentioned deed, with a copy of the certificate of acknowledgment endorsed thereon, is hereto attached and
15 made a part of this answer, which said copy is marked exhibit "A."

And this defendant states that the last mentioned deed was duly deposited for record on the 1st day of March, A. D. 1860, at $12\frac{3}{4}$ o'clock p. m., in the office of the register of deeds of the county of Leavenworth, in the Territory of Kansas, and that the same was duly recorded in said office. All of which will more fully appear by reference to a copy of certificate of such record hereto attached, and made a part hereof, and attached to and a part of exhibit "A," hereto attached.

And this defendant states and charges, that there are now living and in being the following children of the bodies of the said Florinda Clark and Jeremiah Clark, to wit: Arthur Clark, Joseph C. Clark, Levi Clark, and Ella F. Clark, all infants of tender years.

This defendant would, therefore, pray that the said Arthur Clark, Joseph C. Clark, Levi Clark, and Ella F. Clark, infant children of the bodies of the said Florinda Clark and Jeremiah Clark, now
16 living and in being as aforesaid, be made parties defendant, and that the writ of subpœna be awarded to bring into court the said infant defendants, that their rights in the premises may be fully adjudicated.

And this defendant prays that her rights in the premises may be decreed unto her, and especially that the pretended mortgage in the said complainant's bill of complaint mentioned may be set aside and cancelled as to this defendant, that her rights, under and by virtue of the said deed to the said Samuel F. Few, be fully adjudged and decreed to her, and for whatever else may be just and right in the premises, and for her costs.

And she will, as in duty bound, ever pray, &c.

REES & WHEAT,
Sol's for Defendant, Florinda Clark.

UNITED STATES OF AMERICA,
District of Kansas, ss:

17 This affiant, Florinda Clark, the above-named defendant, makes oath and says, that what is contained in her answer, so far as concerns her own act and deed, is true to her own knowledge, and that what relates to the act or deed of any other person or persons she believes to be true; and this affiant farther says, that all the facts, matters, and things stated and set forth in the above and foregoing answer, so far as they are stated on her own knowledge, are true, and so far as they are stated on the information of others she believes them to be true.

FLORINDA CLARK.

Sworn to before me, and subscribed in my presence, this 28th day of June, A. D. 1861.

[SEAL.]

A. F. CALLAHAN,
United States Commissioner, Leavenworth County, District of Kansas.

"*A.*"

This indenture, made and entered into this 12th day of January, in the year of our Lord 1860, by and between Jeremiah Clark
18 and Florinda Clark, his wife, of the county and city of Leavenworth, in Kansas Territory, parties of the 1st part, and Samuel F. Few, of the city, county and Territory aforesaid, of the second part, witnesseth: That in consideration of the sum of one dollar in had paid, the receipt thereof is hereby acknowledged, and in consideration, especially of the settlement and disposition of the

property hereinafter mentioned, to the purposes and objects therein expressed, we the said party of the first part, do hereby give, sell, grant, and convey to Samuel F. Few, the party of the second part, the property hereinafter described, to be held by him and his successors, (to be appointed by the proper court in case of the death, resignation, or inability to act, of the said trustee,) in first, for the especial purpose, persons and object hereinafter specifically designated, and for no other purpose or object whatever. That is to say, the party of the first part, for ourselves, our heirs, executors, administrators and assigns do sell, give, grant and convey to
19 Samuel F. Few, trustee as aforesaid, and his successors, party of the second part, all our right, title, claim and interest, either in law or equity, in and to block number twenty-two, (22) known as Clark Place, in Clark & Rees' addition to Leavenworth, K. T. To have and to hold the aforesaid block, piece, or parcel of land, according to the recorded plat thereof, with all and singular the right, privileges, and appurtenances thereto, to him, the said party of the second part, and his successors as aforesaid, forever in trust, however, for the following purposes and no other, that is to say, said Samuel F. Few, as trustee as aforesaid, and his successors, shall hold said property in trust for the especial use and benefit of Florinda Clark, the wife of Jeremiah Clark, and the children of the bodies of the said Florinda Clark and Jeremiah Clark, in being, or to be born, and the legal heirs of said children, and to none others. And in case of the marriage of the daughter the like limitation is fixed in every
20 respect, as in the case of the parents that there shall be a united enjoyment of the property only, and it shall in all cases decend only to the children of the wife, and in no case shall said portion of the daughter's be liable for the debts and liabilities of their husbands, but shall be limited in strict settlement, as in the previous part of this deed; said property to be used and enjoyed by the said Florinda Clark and Jeremiah Clark, during their natural lives, and during the life of the longer liver of the two, the children not to come into the inheritance until after the death of both parents; said property to be held exclusively to and for the uses and trusts aforesaid, free from the interposition or claim of the said Jeremiah Clark, other than to enjoy as aforesaid, and free from the claim of any and all creditors of his not now existing. And we hereby rest in our trustee and his successor, as aforesaid, the following power, that is, in the event
21 that it may become advisable or desirable to change said property for other property, or in the event that the said Florinda Clark may desire to sell said property, or any part thereof, and invest the proceeds in funds, stock, or otherwise use (so as not to expend the principal) either in the use of the money, or in the purchase of other real estate, then, in that event, when the said Florinda Clark shall express in writing, signed and acknowledged, as deeds are required to be executed, such desire, said trustee shall proceed to sell and convey by deed properly executed, and acknowledge said property or any part thereof herein conveyed in trust, and the proceeds of said sale to be reinvested, as said Florinda Clark may direct in

writing as aforesaid, always, however, to be reinvested for the same objects and purposes as contained in this deed, the trusts herein created to be continued and faithfully preserved. And we,
22 the said party of the first part, hereby warrant and defend the title to said property free from the claim or claims of any and every person or persons claiming, or to claim, by, through, or under us, and the said Samuel F. Few, trustee as aforesaid, party of the second part, for himself, and for his successsors as aforesaid, hereby accepts the trust herein created.

JEREMIAH CLARK. [SEAL.]
FLORINDA CLARK. [SEAL.]
SAMUEL F. FEW. [SEAL.]

TERRITORY OF KANSAS, *Leavenworth County, ss:*

Be it remembered, that on this 14th day of January, A. D. 1860, before me, the undersigned, a notary public in and for the county and Territory aforesaid, personally appeared Jeremiah Clark and Florinda Clark, his wife, and Samuel F. Few, who are personally known to me to be the identical persons who affixed their names and subscribed the foregoing deed as parties thereto, and severally
23 acknowledged the same to be their own voluntary act and deed for the uses and purposes therein contained.

And the said Florinda Clark, being by me made acquainted with the contents of the foregoing instrument of writing, on an examination, separate and apart from her husband, acknowledged on such examination that she executed the same, and relinquished her dower in the real estate therein mentioned, without fear or compulsion from her said husband.

In testimony whereof, I have hereunto set my hand and notorial seal the day and date last above written.

[L. S.] JOSIAH KELLOGG,
Notary Public.

OFFICE REGISTER OF DEEDS,
Leavenworth County and Territory of Kansas, ss:

I, W. S. Van Doren, register of deeds in and for the county aforesaid, do hereby certify that the within and foregoing writing was received by me for record, this 1st day of March, A. D. 1860, at 12¾ o'clock, p. m., and that the same is duly recorded in book
24 "L," for recording deeds of trust, and at page 296 and 297.

In testimony whereof, I have hereunto set my hand and official seal the day and year aforesaid.

[L. S.] W. S. VAN DOREN, *Register.*

Answer endorsed.

And which said answer is endorsed in words and figures following, that is to say:

Wm. T. Reyburn, *v.* Jeremiah Clark, Florinda Clark, and Samuel F. Few, separate answer of defendant Florinda Clark. Filed March 3d, A. D. 1862. John T. Morton, Clerk.

And afterward, to wit, on the 24th day of March, A. D. 1862, the said complainant filed in the office of the clerk of said court his replication to the answer of Florinda Clark, in words and figures as follows, that is to say:

Replication.

United States district court, State of Kansas.—In chancery.

The replication of William S. Reyburn, complainant, to the answer of Florinda Clark, defendant.

25 This repliant, saving and reserving to himself now, and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer for replication thereto, says that he will aver, maintain, and prove his bill of complaint to be true, certain, and sufficient in the law, to be answered unto, and that the said answer of the said defendant is untrue, uncertain, and insufficient to be replied unto by this reppliant without this; that any other or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all of which matters and things this repliant is and will be ready to aver, maintain, and prove, as this honorable court shall direct, and humbly prays, as in and by his said bill he has already prayed.

O. B. HOLMAN,
Sol'r for Complainant.

26 Which said replication is endorsed in words and figures following, that is to say:

United States district ct., Wm. S. Rayburn *vs.* Florinda Clark *et al.* Replication. O. B. Holman, comp't sol'r. Filed March 24, A. D. 1862.

And afterwards, to wit, on the 2nd day of May, A. D. 1862, the said defendant, Few, filed in the office of the clerk of this court his plea to said bill of complaint, in words and figures as follows, that is to say:

Plea.

THE UNITED STATES OF AMERICA,
District of Kansas, ss:

In the district court of the United States for the district of Kansas.

WILLIAM S. REYBURN
vs.
FLORINDA CLARK AND SAMUEL F. FEW. } In equity.

The plea of Samuel F. Few, defendant, impleaded with Florinda Clark, to the bill of complaint of William S. Reyburn, complainant.

This defendant, Samuel F. Few, by protestation, not confessing or acknowledging all or any of the matters and things in said

27 complainants bill to be true, in such manner and form as the same are therein set forth and alleged, doth plead thereunto, and for plea saith: That in the said certain suit in equity in the said complainants bill of complaint mentioned, in which *in which* the complainant in this cause was complainant, and Jeremiah Clark, Florinda Clark, and Samuel F. Few, being the same identical persons whose names are mentioned in the complainant's present bill of complaining, were by the terms of said bill, defendants, no process of subpœna was isssued from the said court, or by the clerk thereof, for or against the said Jeremiah Clark, at the time or after the filing of the said bill of complaint against the said Jeremiah Clark, Florinda Clark, and this defendant, Samuel F. Few, and that the said Jeremiah Clark, did not appear to or in said suit in equity, all of which matters and things this defendant doth aver to be true, and pleads the same to

28 so much of said bill of complaint as sets up the said certain suit in equity and the decree therein, and all matters done under or by virtue of or in pursuance of such suit in equity, or the decree therein, and this defendant humbly demands the judgments of this honorable court whether he ought to be compelled to make any answer to so much of the said bill of complaint as is plead to by this plea, and humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

S. W. JOHNSTON,
Sol'r for Def't, Few.

R. R. REES,
Of Counsel.

In the district c't of United States in and for dist. of Kansas.

WILLIAM S. REYBURN
vs.
FLORINDA CLARK AND SAMUEL F. FEW.

THE UNITED STATES OF AMERICA,
District of Kansas:

The undersigned, one of the defendants in the above-entitled cause, upon his oath says, that the foregoing plea is true in point of fact.

SAMUEL F. FEW.

29 Subscribed in my presence, and sworn to before me this 19th day of April, A. D. 1862.

[SEAL.] A. H. CALLAHAN,
U. S. Commissioner.

I certify that in my opinion the above plea is well founded in point of law.

S. W. JOHNSTON,
Sol'r for Def't, Few.

Filed May 2, 1862.

JOHN T. MORTON, *Clerk.*

And afterward, to wit, on the 24th day of March, A. D. 1862, the said complainant filed in the office of the clerk of said court his replication to the answer of Florinda Clark, in words and figures as follows, that is to say:

Replication.

United States district court, State of Kansas.—In chancery.

The replication of William S. Reyburn, complainant, to the answer of Florinda Clark, defendant.

25 This repliant, saving and reserving to himself now, and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer for replication thereto, says that he will aver, maintain, and prove his bill of complaint to be true, certain, and sufficient in the law, to be answered unto, and that the said answer of the said defendant is untrue, uncertain, and insufficient to be replied unto by this reppliant without this; that any other or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all of which matters and things this repliant is and will be ready to aver, maintain, and prove, as this honorable court shall direct, and humbly prays, as in and by his said bill he has already prayed.

O. B. HOLMAN,
Sol'r for Complainant.

26 Which said replication is endorsed in words and figures following, that is to say:

United States district ct., Wm. S. Rayburn *vs.* Florinda Clark *et al.* Replication. O. B. Holman, comp't sol'r. Filed March 24, A. D. 1862.

And afterwards, to wit, on the 2nd day of May, A. D. 1862, the said defendant, Few, filed in the office of the clerk of this court his plea to said bill of complaint, in words and figures as follows, that is to say:

Plea.

THE UNITED STATES OF AMERICA,
District of Kansas, ss:

In the district court of the United States for the district of Kansas.

WILLIAM S. REYBURN
vs.
FLORINDA CLARK AND SAMUEL F. FEW. } In equity.

The plea of Samuel F. Few, defendant, impleaded with Florinda Clark, to the bill of complaint of William S. Reyburn, complainant.

This defendant, Samuel F. Few, by protestation, not confessing or acknowledging all or any of the matters and things in said

27 complainants bill to be true, in such manner and form as the same are therein set forth and alleged, doth plead thereunto, and for plea saith: That in the said certain suit in equity in the said complainants bill of complaint mentioned, in which *in which* the complainant in this cause was complainant, and Jeremiah Clark, Florinda Clark, and Samuel F. Few, being the same identical persons whose names are mentioned in the complainant's present bill of complaining, were by the terms of said bill, defendants, no process of subpœna was isssued from the said court, or by the clerk thereof, for or against the said Jeremiah Clark, at the time or after the filing of the said bill of complaint against the said Jeremiah Clark, Florinda Clark, and this defendant, Samuel F. Few, and that the said Jeremiah Clark, did not appear to or in said suit in equity, all of which matters and things this defendant doth aver to be true, and pleads the same to
28 so much of said bill of complaint as sets up the said certain suit in equity and the decree therein, and all matters done under or by virtue of or in pursuance of such suit in equity, or the decree therein, and this defendant humbly demands the judgments of this honorable court whether he ought to be compelled to make any answer to so much of the said bill of complaint as is plead to by this plea, and humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

S. W. JOHNSTON,
Sol'r for Def't, Few.

R. R. REES,
Of Counsel.

In the district c't of United States in and for dist. of Kansas.

WILLIAM S. REYBURN
vs.
FLORINDA CLARK AND SAMUEL F. FEW.

THE UNITED STATES OF AMERICA,
District of Kansas:

The undersigned, one of the defendants in the above-entitled cause, upon his oath says, that the foregoing plea is true in point of fact.

SAMUEL F. FEW.

29 Subscribed in my presence, and sworn to before me this 19th day of April, A. D. 1862.

[SEAL.] A. H. CALLAHAN,
U. S. Commissioner.

I certify that in my opinion the above plea is well founded in point of law.

S. W. JOHNSTON,
Sol'r for Def't, Few.

Filed May 2, 1862.

JOHN T. MORTON, *Clerk.*

And afterwards, to wit, on the said 2d day of May, 1862, said defendant, Few, filed his demurrer to the said complainant's bill of complaint in words and figures following, that is to say:

Demurrer.

In the district court of the United States for the district of Kansas.

WILLIAM S. REYBURN
vs.
FLORINDA CLARK AND SAMUEL F. FEW. } In chancery.

This defendant, Samuel F. Few, by protestation, not confessing or acknowledging all or any of the matters and things in the
30 said complainant's bill of complaint to be true in such manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer showeth that the said complainant hath not, in and by said bill, made or stated such a case as doeth or ought to entitle him to any such discovery or relief as is thereby sought and prayed for from or against this defendant. Wherefore the said defendant demands the judgment of this honorable court whether he shall be compelled to make any other or further answer to the said bill, or any of the matters or things therein contained, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

S. W. JOHNSTON,
Sol'r for Defendant.

R. R. REES, *Of Counsel.*

I certify that in my opinion the above demurrer of the defendant, Samuel F. Few, is well founded in point of law.

S. W. JOHNSTON,
Sol'r for Defendant.

31 In the district court of the United States for the district of Kansas.

WILLIAM S. REYBURN
vs.
FLORINDA CLARK AND SAMUEL F. FEW. } In chancery.

THE UNITED STATES OF AMERICA,
State of Kansas, ss:

Personally appeared before the undersigned, a commissioner of the above-named court, the defendant in the above-stated cause, the defendant of the above-named case, Samuel F. Few, who, being by me first duly sworn, says that the foregoing demurrer is not interposed for delay.

SAMUEL F. FEW.

Sworn to before me, and subscribed in my presence this 4th day of April, 1862.

[SEAL.]

A. F. CALLAHAN,
U. S. Commissioner, Dist. of Kansas.

Which said demurrer is endorsed as follows, to wit:

Filed May 2nd, A. D. 1862. John F. Morton, clerk.

And afterwards, to wit, on the 3d day of May, A. D. 1862, the said complainant filed in the office of the clerk of said court
32 his answer to the plea of said defendant Few, in words and figures as follows, that is to say:

Answer.

U. S. dist. c't, State of Kansas.

WM. L. REYBURN
vs.
FLORINDA CLARK AND SAMUEL F. FEW. } In chancery.

The above-named complainant, for his answer to the plea of the defendant, Samuel F. Few, says that he admits that so much of said plea is true as alleges that no subpœna was issued in said action; and said complainant, further answering, says that the said defendant, Jeremiah Clark, in said action, and before the filing of the amended bill therein, did appear in said action in this court, by R. R. Rees, his counsel, and put on file a plea to the petition of complainant, and this he will maintain and prove.

O. B. HOLMAN,
Sol'r for Complainant.

Which said answer is endorsed as follows, to wit:

Endorsed: Reply to plea. Filed May 3d, A. D. 1862. J. T. Morton, clerk.

33 And on said 3rd day of May, A. D. 1862, the said demurrer and plea of said defendant Few were set down for argument.

And afterwards, to wit, at a term of the district court of the United States for the district of Kansas, begun and held at Topeka, in said district, on Monday, the 14th day of April, A. D. 1862, the following proceedings were had in said cause, to wit:

Entry.

WILLIAM S. REYBURN
vs.
FLORINDA CLARK AND SAMUEL F. FEW. } In equity.

MONDAY, *May 5th, A. D.* 1862.

Now come, as well the said complainant, by O. B. Holman, esq., his solicitor, as the said defendants, by S. W. Johnston, esq., their solicitor.

And the plea of the defendant, Samuel F. Few, being heard and argued by counsel, is disallowed by the court.

And thereupon the demurrer of the said defendant, Samuel F. Few, to the bill of complaint herein filed by said defendant, Samuel F. Few, being argued, is overruled by the court.

And thereupon, on motion of said complainant, by his solici-
34 tor. it is ordered by the court that the said complainant have leave to amend his bill in this cause.

And on motion of the defendant, Florinda Clark, it is ordered that she have leave to withdraw her answer herein, and that the clerk deposit the same with the papers in the case of William S. Reyburn *vs.* Jeremiah Clark *et al*, No. 8, in which it was originally filed as an answer.

And thereupon the said defendants, Florinda Clark and Samuel F. Few, are ruled to answer by the first Monday in June next.

And thereupon the said complainant filed in the office of the clerk of said court his amended bill of complaint in words and figures as follows, that is to say:

To the Honorable Archibald Williams, judge of the United States district court for the district of Kansas:

William S. Reyburn, a citizen and resident of the State of Pennsylvania, brings this his bill of complaint against Jeremiah Clark, Florinda Clark, his wife, and Samuel F. Few, each citizens and residents of the State of Kansas.

35 And thereupon your orator, complaining, says that on the 30th day of April, A. D. 1859, the defendant, Jeremiah Clark, executed and delivered unto your orator his promissory note, payable to the order of your orator, 12 months after date, for the sum of six thousand two hundred and fifty dollars, with interest after maturity, until paid, at 25 per cent. per annum; that on the same day the said Jeremiah Clark, together with the defendant, Florinda Clark, his wife, to secure the payment of said note and interest, executed and delivered to your orator a mortgage conveyance of the following real property, to wit: Block number twenty-two (22) in Clark and Rees' addition to the city of Leavenworth, known as "Clark Place," on the plat of said town, with all improvements, which said mortgage was conditioned for the payment of the principal and interest mentioned in said note; that the said conveyance was, on the 30th day of April, A. D. 1859, duly and legally acknowledged by the said
36 Jeremiah Clark and the said Florinda Clark, his wife, and was on the 3d day of May, A. D. 1859, filed for record in the office of the register of deeds of Leavenworth county, and recorded as a mortgage in book "H" of records, pages 379 and 380, as by the said mortgage, with the certificate of acknowledgement and record endorsed thereon, will more fully appear, now ready to be produced as this court shall direct.

And your orator, further complaining, says that when the said note became due and payable, the said Jeremiah Clark, then and at all times since, has utterly failed to pay the same, or any part thereof; and

that in this honorable court, on the 25th day of October, 1861, in chancery, sitting in a certain action thereon pending, in which your orator was complainant, and Jeremiah Clark, Florinda Clark, his wife, and Samuel F. Few, being the same persons who are defendants in this action, were defendants, which said action was then and there dismissed before decree as to the said defendants, Florinda
37 Clark and Samuel F. Few, it was by the consideration of said court decreed that there was due your orator on said note and mortgage from the said Jeremiah Clark the sum of eight thousand five hundred and sixty-seven dollars and seventy cents, and it was by said court further decreed that the said Jeremiah Clark be forever foreclosed and barred of any interest in and to said mortgaged premises, and every part thereof, and that the said premises be sold by and under the direction of the U. S. marshall, and in conformity with said decree, and the proceeds of such sail applied to the satisfaction of the sum so as aforesaid decreed to be due your orator from the said Jeremiah Clark.

And your orator, further complaining, says that on the 21st day of Dec. 1861, in pursuance of said decree, the U. S. marshall for this district sold the said property to your orator for the sum of seven thousand dollars ($7000 00.) and that on the 23rd day of December, 1861, the said U. S. marshall executed and delivered to your
38 orator a deed of conveyance for said property; and your orator further says that there is still due and unpaid to him from the defendant, Jeremiah Clark, of the sum so as aforesaid decreed to be due him, the sum of one thousand eight hundred and eighty-four dollars and twenty-five cents, for the payment of which the interest of the said Florinda Clark in the said property stands charged; that the defendant Samuel F. Few, under a deed of trust from said Jeremiah Clark and Florinda Clark, to him in trust bearing date January 12th, 1860, claims to have the interest of a trustee in said property, which interest your orator charges to be inferior and subsequent to his interest in said property under his said mortgage.

Wherefore, your orator prays that by a proper decree of this court the said defendant, Florinda Clark and Samuel F. Few, may be foreclosed of any interest, right or claim in and to said mortgaged premises and every part thereof, and that this court will decree
39 unto your orator such other and further relief as he may be entitled to, including his costs in this may behalf; and may it please your honor also to grant unto your orator your most gracious writ of subpœna to be directed to the said Jeremiah Clark, commanding him on a day certain, to be named in said subpœna, to be and appear before your honor, and answer unto your orator's bill of complaint; and your orator will ever pray, &c.

O. B. HOLMAN,
Sol'r for Defendant.

T. A. HURD, *of Counsel.*

Which said amended bill of complaint is endorsed in words and figures following, that is to say:

Endorsed: U. S. dist. ct. dist. of Kansas, Wm. S. Reyburn *vs.* Jeremiah Clark *et al.* Amended bill. Filed May 5th, A. D. 1862. John F. Morton, clerk.

Whereupon, there issued from the office of the clerk of said court a writ of subpœna in chancery, in words and figures following, that is to say:

40 The United States of America to Jeremiah Clark, greeting:

We command you, that you appear before our judge of our district court of the United States of America for the district of Kansas, at Topeka, in said district, on the first Monday in the month of June next, to answer the bill of complaint of William S. Reyburn, this day filed in the clerk's office of said court in said city of Topeka, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshall of the district of Kansas to execute.

Witness, the Honorable Archibald Williams, judge of our said court at Topeka aforesaid, this seventh of May, in the year of our Lord one thousand eight hundred and sixty-two, and of our independence the eighty-sixth.

JOHN F. MORTON, *Clerk.*

Memorandum.

The above defendant is notified that unless he enter his appearance in the clerk's office of said court, at Topeka aforesaid, on or before the day to which the above writ is returnable, the
41 complaint will be taken against him as confessed, and a decree entered accordingly.

JOHN T. MORTON, *Clerk.*

And which said writ of subpœna is endorsed with words and figures following, that is to say:

No. 93. District court United States, district of Kansas. William S. Reyburn *vs.* Florinda Clark *et al.* Chancery. Subpœna. Returnable to rule day first Monday in June, A. D. 1862. John F. Morton, clerk. O. B. Holman, compl't's sol'r.

And which said writ was, on the 1st day of May, A. D. 1862, returned by the marshall of the said district into the office of the clerk of the said court, with a return of his doings endorsed thereon, to wit:

Return.

Rec'd this writ May 7th, A. D. 1862, and served the same by delivering to Jeremiah Clark, party within named, personally, a certi-

fied copy of same, May 9th, A. D. 1862. Service 1=$2 00; Mileage 60=$3 60. Total, $5 60.

JAMES L. McDOWELL,
United States Marshall.
Per WM. MEDELL, *Deputy.*

42 And afterwards, to wit, on the 2nd day of June, A. D. 1862, the said defendant, Samuel F. Few, filed in the office of the clerk of this court, his separate answer to this amended bill of complaint herein, in words and figures as follows, to wit:

Answer of Few.

In the district court of the United States of America for the district of Kansas.

JEREMIAH CLARK, FLORINDA CLARK, AND Samuel F. Few, *ats.* WILLIAM S. REYBURN.	In chancery.

UNITED STATES OF AMERICA,
District of Kansas:

The separate answer of Samuel F. Few to the amended bill of complaint of the said complainant, William S. Reyburn, against Jeremiah Clark, Florinda Clark, and Samuel F. Few:

For answer thereto, or so much thereof as he is advised it is material for him to answer unto, answers and says, that now at, all times saving and reserving unto himself all and all manner of benefit and advantage of exception, which can or may be had to the many
43 errors and uncertainties and imperfections in the said complainant's bill of complaint contained; that as to the charge in said amended bill of complaint, that the defendant, Samuel F. Few, under a deed of trust from Jeremiah Clark and Florinda Clark, to him in trust, bearing date January 12th, A. D. 1860, claiming to have the interest of a trustee in said property, this defendant charges the fact to be, that about the 12th day of January, A. D. 1860, the said Jeremiah Clark and Florinda Clark made, executed, and delivered to this defendant a deed for block number twenty-two, (22,) known as Clark Place, in Clark & Rees' addition to the city of Leavenworth, in the county of Leavenworth, in the then Territory of Kansas, for the uses and purposes, and for the benefit of the persons in said deed specified; that the persons for whose especial benefit was so conveyed in trust to this defendant, by said last-mentioned deed, were the said Florinda Clark, wife of the said Jeremiah Clark, and the children of the bodies of the said
44 Florinda Clark and Jeremiah Clark, in being, or to be born, and the legal heirs of said children, and none others, with certain other limitations in relation to the further decent thereof, and to the use, occupancy, and disposition of said real estate in said

deed more specifically set forth and stated, as by reference thereto will fully appear, a copy of which said deed is attached to the answer of the defendant, Florinda Clark, to the amended bill of complaint in this cause, which is here referred to and made a part of this answer. And as to all other statements and charges in the said complainant's amended bill of complaint, this defendant has no personal knowledge, and knows nothing in relation thereto, and hereby disclaims all interest in the matters in controversy in this case, except as such trustee in said last-mentioned deed. Wherefore, this defendant prays that the court would fairly and justly adjudicate as between the parties in interest in this cause, and that he,
45 this defendant, be discharged, with his costs; and he, this defendant, will ever pray, &c.

S. W. JOHNSTON,
Sol'r for Defendant.

R. R. REES, *of Counsel.*

UNITED STATES OF AMERICA, *District of Kansas:*

This affiant, Samuel F. Few, the above named defendant, makes oath and saith, that all the facts, matters and things stated and set forth in the above and foregoing answer, of this affiant as therein stated and set forth, so far as the same are stated on his own knowledge, are true; and so far as the same are stated on the information of others, he believes them to be true.

SAMUEL F. FEW.

Sworn to and subscribed before me this 31st day of May, A. D. 1862.

[SEAL.]

A. F. CALLAHAN,
U. S. Com'r, Dist. of Kansas.

Which said answer is endorsed as follows, to wit:

Endorsed: No. 93. U. S. dist. ct. dist. of Kansas. William S. Reyburn *vs.* Jeremiah Clark, Florinda Clark, and Samuel F.
46 Few. Answer of Samuel F. Few to amended bill. Filed June 2d, 1864. John T. Morton, clerk.

MONDAY, *October 13th, A. D.* 1862.

At a term of the circuit court of the United States in and for the district of Kansas, begun and held at Topeka, in said district, on Monday, the thirteenth day of October, in the year of our Lord one thousand eight hundred and sixty-two, and of the independence of the United States the eighty-seventh.

Present, Hon. Archibald Williams, judge, John T. Morton, clerk, James L. McDowell, marshal.

Be it remembered, that at the October term, A. D. 1862, of said circuit court, begun and held as aforesaid, among other things, on the

24th day of October A. D. 1862, a decree, of which the following is a copy, was made and rendered in said cause, (which had by act of Congress been transferred into said circuit court,) to wit:

47 *Decree.*

United States circuit court, ninth circuit, district of Kansas.—Decree in equity.

WILLIAM S. REYBURN, compl't,
vs.
FLORINDA CLARK, SAMUEL F. FEW, AND Jeremiah Clark, defendants. } Equity.

This cause having been brought on this day to be heard by the court on the amended bill of complaint of the said complainant, taken as confessed, against the said defendants, J. Clark and Florinda Clark, and upon the answer to said amended bill of complaint of defendant, Samuel F. Few, the same having been set down for hearing on bill and answer.

On motion of O. B. Holman, solicitor for the complainant, it is by the court ordered, adjudged, and decreed that the defendants, Jeremiah Clark, Florinda Clark, and Samuel F. Few, and each of them, be, and the same are hereby, foreclosed and forever barred of any equity or right of redemption. claim, interest, or demand
48 in and to the property described in said bill of complaint and every part thereof, to wit:

Block number twenty-two (22) in Clark and Rees' addition to the city of Leavenworth, county of Leavenworth, State of Kansas.

And it is further ordered, adjudged, and decreed that the said complainant have and recover of said defendants, his costs in this behalf expended, and that an execution issue therefor.

October 24, 1862.

ARCHIBALD WILLIAMS.

And which said decree so filed, is in words and figures endorsed as follows, that is to say:

Endorsed: U. S. circuit court district of Kansas. Wm. S. Reyburn *vs.* J. Clark *et al.*, in equity. Decree. O. B. Holman, compl'ts sol'r. Filed October 24th, A. D. 1862. John F. Morton, clerk.

49 JEREMIAH CLARK, FLORINDA CLARK, AND Samuel F. Few, appellants,
against
WILLIAM S. REYBURN, appellee.

To the Honorable the Supreme Court of the United States:

The appeal of Jeremiah Clark, Florinda Clark, and Samuel F. Few, the above-named appellants, respectfully showed that on the 2nd day of January, 1862, the above-named William S. Reyburn, filed his bill in the district court of the United States for the district

of Kansas, against Florinda Clark and Samuel F. Few, in a cause in equity; and that said Florinda Clark and Samuel F. Few, having been served with process, appeared to said bill, and to which bill your petitioner, Samuel F. Few, filed a plea, which was disallowed by the court. Your petitioner, the said Samuel F. Few, also filed a demurrer to said bill, which was overruled, and your petitioner, Florinda Clark, filed an answer to said bill, and thereafter the said
50 William S. Reyburn, had leave of the court to file his amended bill and thereupon the said Florinda Clark, had leave of the court to withdraw her answer; and thereupon the said Florinda Clark and Samuel F. Few were ruled to answer by the first day of June, 1862.

And afterwards, on the 5th day of May, 1862, the said William S. Reyburn filed his amended bill in said court against Jeremiah Clark, Florinda Clark, and Samuel F. Few, for the foreclosure of any interest, right, or claim of Florinda Clark and Samuel F. Few, in and to block number twenty-two, (22) in Clark and Rees' addition to the city of Leavenworth, known as "Clark Place," on the plat of said town, and every part thereof, and with a prayer of general relief, with a request that a subpœna issue, directed to said Jeremiah Clark, commanding him to answer said bill; whereupon said subpœna was issued and served upon said Jeremiah Clark, and on the 2nd day of June, 1862, your petitioner, Samuel F. Few, filed his separate
51 answer to said amended bill; and such proceedings were had on said amended bill and the said answer thereto; that on the 24th day of October, 1862, a final decree was made and pronounced therein by the circuit court of the United States, for the district of Kansas, wherein it was in substance adjudged and decreed, that your petitioners, Jeremiah Clark, Florinda Clark, and Samuel F. Few be foreclosed and forever barred of any equity or right of redemption, claim, interest, or demand in and to the above-described property and every part thereof, to wit: Block number twenty-two (22) in Clark and Rees' addition to the city of Leavenworth, county of Leavenworth, State of Kansas; and that the said William S. Reyburn recover of and from your petitioners his costs in that behalf expended, and that execution issue therefor, which said decree of said circuit court is, as these appellants are advised, erroneous, and ought to be reversed.

52 Your petitioners further respecfully show that the value of said block twenty-two (22) at the time of the filing of the bill in this cause, as well as at the time of the rendition of the decree aforesaid, and now is, more than two thousand dollars, and that the right of your petitioners and of each of them, in said property, at the time of filing the bill aforesaid, as well as at the time of the rendition of the decree aforesaid, exceeded two thousand dollars in value. Wherefore these appellants, and each of them, appeal from the whole of said decree of said circuit court to the Supreme Court of the United States, and respectfully pray that the said decree of the said circuit court, and the bill, answer, pleadings, depositions, evidence, and proceedings in the said cause may be sent to the Supreme

Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the
53 said decree of the circuit court, and every part thereof, may be reversed, and a decree made dismissing said bill, with the costs, or such other decree as to the said Supreme Court shall seem just.

JEREMIAH CLARK,
FLORINDA CLARK,
SAMUEL F. FEW,
Appellants.

L. B. WHEAT, *of Counsel.*
WM. MCNEILL CLOUGH, *Solicitor.*

The appeal as prayed for in the within petition is hereby granted, this 30th day of September, A. D. 1867, and the clerk of the circuit court of the United States for the district of Kansas is hereby directed to forward the papers and proceedings as prayed for in the within petition, satisfactory evidence having been produced to me that the interests of said appellants, and of each of them, in the matter in dispute, exclusive of costs, exceeds the sum of two thousand dollars.

54 Given under my hand at Leavenworth city, in said district of Kansas, this 30th day of September, A. D. 1867.

MARK W. DELAHAY.
One of the Judges of the Circuit Court of the U. S. for the District of Kansas.

Endorsed: No. . Jeremiah Clark, *et al*, appellant. *vs.* Wm. S. Reyburn, appellee. Petition for appeal. Filed Octo. 3, 1867. A. S. Thomas, clerk.

55 Circuit court of the U. S. of America, district of Kansas, in the ninth circuit.

JEREMIAH CLARK, FLORINDA CLARK, AND Samuel F. Few, appellants,
against
WILLIAM S. REYBURN, appellee.

Know all men by these presents, that we, James F. Legate and La Fayette Mills, of the city and county of Leavenworth, in the State and district of Kansas, are held and firmly bound unto the above-named William S. Reyburn, in the sum of five hundred dollars, to be paid to the said William S. Reyburn, appellee, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the thirtieth day of September, A. D. 1867.

Whereas, the above named appellants have prosecuted an appeal to the Supreme Court of the United States, at the city of
56 Washington, in the district of Columbia, to reverse the de-

cree rendered in the above suit by the circuit court of the United States, for the district of Kansas.

Now, therefore, the condition of this obligation is such that if the above named appellants shall prosecute their appeal to effect and answer all damages and costs if they fail to make their appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

JAMES F. LEGATE. [SEAL.]
LA FAYETTE MILLS. [SEAL.]

Sealed and delivered, and taken and acknowledged, this 30th day of September, 1867, before me.

HENRY M. BURLEIGH,
United States Commissioner, District of Kansas.

57 UNITED STATES OF AMERICA,
District of Kansas, ss:

Being duly sworn, depose and say, and each for himself saith, that he is worth the sum of one thousand dollars, over and above all just debts and liabilities.

JAMES F. LEGATE.
LA FAYETTE MILLS.

Sworn to, this 30th day of September, A. D. 1867, before me.

HENRY M. BURLEIGH,
United States Commissioner, District of Kansas.

I approve the above bond, and the sufficiency of the sureties thereto.

Dated Leavenworth city, Kansas, September 30, 1867.

MARK W. DELAHAY,
One of the Judges of the Circuit Court for the District of Kansas.

58 Endorsed: No. 14. Jeremiah Clark, *et al*, appellant, *vs.* Wm. S. Reyburn, appellee. Bond for appeal. Filed Octo. 3, 1867. A. S. Thomas, clerk.

59 The United States of America, to William S. Reyburn:

Whereas, Jeremiah Clark, Florinda Clark, and Samuel F. Few, have lately appealed to the Supreme Court of the United States, from a decree lately rendered in the circuit court of the United States for the district of Kansas, in the ninth circuit, made in favor of you, the said William S. Reyburn, against them, the said Jeremiah Clark, Florinda Clark, and Samuel F. Few, and have filed the security required by law:

You are therefore cited and admonished to be and appear at and before the Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to and to answer to said appeal, and to do and receive what may appertain to justice to be done in the premises.

Witness the Honorable Mark W. Delahay, one of the justices of the circuit court of the United States for the district of Kansas, in the ninth circuit, this 4th day of October, 1867.

MARK W. DELAHAY,
One of the Judges of the Circuit Court of the U. S. for the District of Kansas.

60 UNITED STATES OF AMERICA,
District of Kansas, in the ninth circuit:

Everett K. Dexter, of lawful age, being duly sworn, says, that on the 4th day of October, 1867, at the district aforesaid, he served the within citation on T. A. Hurd, esq'r, counsel of record for the within mentioned William S. Reyburn, by delivering to him personally a true copy thereof.

EVERETT K. DEXTER.

Subscribed in my presence, and sworn to before me this 4th day of October, 1867.

HENRY M. BURLEIGH,
United States Commissioner, District of Kansas.

61 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, A. S. Thomas, clerk of the circuit court of the United States for the district of Kansas, do hereby certify that the above and foregoing is a true, correct, and complete copy of the record and files of the said court in the above-entitled cause, to wit:

WILLIAM S. REYBURN *vs.* FLORINDA CLARK, JEREMIAH CLARK, AND Samuel F. Few.	In equity.

No. 59, in the district court of the United States for said district of Kansas, in A. D. 1861, and No. 14, in said circuit court, to which it was transferred by act of Congress from said district court, and also a true, correct, and complete copy of the petition for appeal in said cause, and of the order granting the same, of the bond for appeal in said cause, and of the approval thereof; also above is the original citation to the appellee in said cause, William S. Reyburn, and of the proof of service thereof.

In testimony whereof, I have hereunto set my hand and
62 affixed the seal of said circuit court of the United States for the district of Kansas, at Topeka, in said district, this 5th day of October, 1867.

[SEAL.] A. S. THOMAS, *Clerk.*

[5 ct. U. S. rev. stamp.]

Supreme Court of the United States

DECEMBER TERM, 1868.

CLARK ET AL., *vs.* REYBURN.

BRIEF.

E. STILLINGS, *for Appellee.*

In the Supreme Court of the U. S.

CLARK et al., *vs.* REYBURN.

The first objection made to the proceedings in the Court below, as made by plaintiff's brief, is that no time was given the defendants in the decree within which to pay the money due or be foreclosed. While it is conceded that the usual practice has been to allow the defendants to pay in a certain time to be determined by the Court, it is also claimed that this case forms an exception which warranted the Court in making the decree appealed from, and that the whole matter was one in the discretion of the Court, under all the circumstances of the case. That such is the rule, I refer to 11 Leigh, (Va.,) 299 and 300, where the Court so declared, and also say that a failure to give time is not a ground of reversal, at least until application shall first have been made to the Court and refused. Reference is also made to 4th Johnson's Chy., Prime *vs.* Dun, 140. And that such should be the rule, I refer to 2 Daniel's Chy., 1017, which shows that the defendants could have made application and had such time given or refused within any reasonable time after the rendition of the decree

If it was in the discretion of Court below to grant the defendants such relief, I submit that no appeal should lie from the decree till such relief has been refused by the Court below. That decree was allowed to stand near five years, and no such request has yet been made. None of the defendants have shown any desire to redeem to this day. The property was, during all that time, the subject of sale, in a new country, where land is as much an article of trade as personal property, and where the rapid changes in the value of the property make it the interest of the defendants to avoid or stand by the decree as circumstances should indicate. What interest may have vested in other parties on

the faith of this decree cannot be made to appear in this case; but it is a fair presumption to those conversant with the course of business in a new country, that the original complainant has little interest in the court of this suit.

The bill on which this decree was rendered was in the nature of a supplemental bill. Its object was to carry out and enforce the proceedings already had against the principal mortgagor, and to complete the foreclosure as well against him as against the other parties claiming interests in the property. Such bill could well be brought.—*Story's Equity Pleadings*, 332. There is no complaint that time enough had not been given in the first case for redemption.

But there is a sufficient reason why the Court should not have given time in this decree.

An attempt had been made to foreclose, and the complainant delayed all that he could be in the former case. It does not appear affirmatively why the former case had been dismissed as to Mrs. Clark and Few, but it does appear by the plea in this case that there were objections to the process in that, and it is a fair inference that that was the cause of the dismissal.

Taking this to be true, and also the dilatory defences made in this case below, connected with the fact that the deed set up and used as a means to prevent a foreclosure was evidently designed and intended to prevent, or make more difficult, a foreclosure; and the Court would be not only justified, but required, to render such a decree. In support of this view I refer to Story's Equity Pleading, Sec. 194.

The decree is a confirmation of the sale already made and foreclosure of the interests or claims of the defendants, when viewed as a supplemental suit, which it is claimed to be.

The second point made by the plaintiff's brief is founded on what is claimed to be the law of Kansas as the rights of mortgagors and mortgagees. That law took effect June 1, 1859, after this mortgage was made, and could not effect the rights of the parties under this mortgage. See compiled Laws of Kansas, 357.

It is, not, however conceded that the Courts of Equity of the United States can be bound by the laws of the State as to the remedy to enforce the rights of parties. 13 Peters, Clark *vs.* Smith.

The next objection is that no replication was filed. The defendant, Few alleged the same fact alleged by the complainant. To deny it by replication was to deny his own

bill. No replication was necessary.—(Story's Equity Pl., 849.)

The plaintiff claims that there was a want of proper parties. Under Rule 52 the objection should have been made below. By not doing so it is waived.

But was there any want of proper parties? Few and Mrs. Clark, defendants, had the complete power of the disposition of this property. In such case no other parties are necessary.—(Story's Equity Pl., 149.)

Besides, it is perfectly apparent, both from the face of this deed and the circumstances under which it was made, and the use made of it in that case, that it was made to entangle the title and increase the difficulty of foreclosing. In such case it is not necessary to follow the parties.—(Story's Equity Pl., 194.) Besides, while it may be inferred, it does not affirmatively appear that any other beneficiaries were then in existence.

It is objected new parties were imperfectly made by amendment. This is also unfounded.—(Story's Equity Pl., 334.) but the objection is waived by not being taken below.

The objection is made that no evidence was taken. The Rule of Court does not require the decree to show whether evidence was taken, or, if so, how taken.—(Rule 86.)

But why should testimony be taken? The plea of Few, filed undr oath, (see page 11,) was part of the record, and admitted all the facts not admitted by this answer. But the answer not denying admits the facts.—(Story's Equity Pl., 694, and 846, c.; 2 Daniels' Ch., 832.

I have prepared this reference to authorities in addition to the brief of Judge Black for the reason that he may not be able to be present to present the law in connection with his brief, and hope this may be sufficient apology.

E. STILLINGS,
For Appellee.

Supreme Court of the United States.

DECEMBER TERM, 1868.

CLARK et al. vs. REYBURN.

J. S. BLACK,

For Appellee.

J. L. Pearson, Printer, corner 9th and D streets.

IN THE

Supreme Court of the United States.

DECEMBER TERM, 1868.

CLARK ET AL. VS. REYBURN.

This was a bill, filed in the circuit court, to foreclose a mortgage, which Jeremiah Clark and Florinda, his wife, had given to Wm. Reyburn, upon certain property in Leavenworth, to secure a promissory note for $5,250—money lent by the mortgagee to the mortgagors.

Samuel R. Few was made a defendant because, *after* the date of the mortgage, and before the commencement of this suit, the mortgagors (Clark and wife) had conveyed the mortgaged premises to him, in trust for them and their children.

The mortgage of Clark and wife to Reyburn is dated April 30, 1859. The deed of trust to Few was executed January 12, 1860. This suit was brought January 2, 1862.

To the bill, *as first filed*, Few pleaded a false plea, which the court disallowed. Then he put in a sham demurrer, which, after argument, was overruled. Florinda Clark took no notice of the bill, except this: that she, or somebody for her, went to the record of another suit, between the same parties, which had previously been ended and disposed of; took an answer, which she had filed in that other cause, and placed it, bodily, among the records of this one. On her motion, she was permitted

to withdraw the paper, and the clerk was ordered to put it back where it came from. Jeremiah Clark had, at that time, not appeared at all.

The case was in this condition on the 5th of May, 1862, when the court gave the plaintiff leave to file an amended bill of complaint, and ruled Mrs. Clark and Few to answer by the first Monday in June.

All these things appear (by the record, p. 14,) to have been done on the same day, (5th May, 1862.) At that time the plea and the demurrer of Few were disposed of; the answer of Mrs. Clark was sent back where it belonged; leave was given to file an amended bill, and immediately thereupon it was filed; and the two defendants, Florinda and Few, were ruled to answer.

By the amended bill, (which will be found on pages 14 and 15,) the plaintiff prayed for a subpœna against Jeremiah Clark. This had been omitted in the bill, as first filed. The subpœna was issued and served.

Now we have a bill of complaint, in due form, freshly filed, and all the defendants properly notified and brought into court. If the mortgage creditor was not to have his money, or so much of it as he could make out of the land, now was the time to show the reason why.

But the two Clarks, husband and wife, refused to make any defence whatever. They denied no fact asserted in the bill, and showed no reason in law or equity why the relief prayed for by the plaintiff ought not to be given.

Few did put in an answer, and it consisted merely in a statement of the known and admitted fact that the other parties had executed a deed of trust to him for their own use, and that of their children, but he acknowledged this deed of trust to have been made subsequent to the date of the mortgage. As to other matters charged in the bill, he denies all knowledge, and disclaims all interest, except as trustee, and closes with a somewhat superfluous prayer, that the court will adjudicate fairly and justly between the parties who *have* an interest.

The prayer was answered. The court made the only decree which was possible upon the pleadings and evidence. Fairly and justly, their adjudication could be what it was, and nothing else. As to the two Clarks who refused to plead, answer, or demur, the bill was taken *pro confesso*. As to Few, the cause was heard on the bill and answer, the answer being admitted as true. But, certainly, it could not be expected of any court that it would pronounce the rights of a mortgagee to be defeated by a deed of trust, subsequently made for the use of the mortgagors. And it cannot be believed that even that was contested on the hearing.

The decree stood undisturbed, and without complaint, for *five years, less twenty days*, when this appeal was taken. By dragging their creditor a thousand miles to defend his right, they vex, harrass, and delay him, and put him to an expense about equal to the remainder of his debt; "which, if not victory, is at least revenge."

The appellants, by their counsel, have filed a brief, or argument, against the decree of the court below. It is difficult to see the grounds on which they expect a reversal. No specific error is alleged. But the authorities citied, and the reasoning given *arguendo*, enables us to see that the objections are mainly those which follow:

1. *The former bill for a foreclosure and decree against Jeremiah Clark was a bar of this suit.*

The answer to this requires some prefatory explanation of facts not yet adverted to. Previously to the bringing of this bill now under consideration, Reyburn had brought another apparently against the same parties, and for the purpose of foreclosing the same mortgage. He proceeded in that suit to final decree against Jeremiah Clark alone, and sold the property under it, he himself being the purchaser at $7,000. This left about $1,800 of the mortgage debt unpaid, and left Mrs. Clark's interest (which was a right of dower only) outstanding and undisposed of. Fearing that at some future time she or the trustee might

claim the equity of redemption, and desiring to remove all cloud from his title, he brought this bill to get a foreclosure against Florinda and Few. In his bill he referred to the sale under the former decree merely to show why he did not claim the whole amount of the mortgage, but a balance of $1,800 only, and for the further purpose of showing that he was already the owner of the whole estate, except the right of dower which Mrs. Clark might have after her husband's death.

Now, it is said by the appellants that the mortgage is *merged* in the decree against Jeremiah Clark, and the dismissal of the bill against the two other defendants bars another suit.

It is not denied by the appellant's counsel that a person holding under a mortgage which has been foreclosed against some of the mortgagors, may use it as a defence against others who were not parties to the decree. When the mortgage is not merged it remains in full force, and in reason it ought to avail the mortgagee for all purposes. There is no authority for the proposition that a mortgagee who has a decree against one mortgager and sale of his interest, which does not bring enough to satisfy the debt, may not proceed against the others, and get a foreclosure which will save his estate from all future claims of theirs.

If the first cause had been heard, and after hearing a final decree had been made between all the parties, dismissing the bill as to some and adjudging foreclosure as to the other, and the record showing this had been pleaded and produced, it would have been a bar. But nothing like this occurred. The record of the first suit was not shown. The fact that there was a suit is mentioned in the bill, but it does not appear how, or why, or upon what terms the dismissal took place as to Mrs. Clark and Few. The counsel *allege* in their argument that it was such a dismissal as would and ought to be a bar, and they try to make it out by strained inferences; but they alleged no such thing in the court below. Much less did they prove,

or attempt to prove it, as they could have done with the greatest possible ease if it had been true.

But will you allow a defendant to set up in this court a technical defence which he did not produce in the court below? Was not the decree right on the pleadings and proofs as they stood? If there be anything settled, it is that a chancellor must decide *secumdum allegata et probata.*

2. The appellants complain *that the circuit court made a decree of strict foreclosure.*

It certainly will not be denied that a decree in that form and having that effect may be properly and justly made when the circumstances of the case require it. It was required here. The plaintiff had already foreclosed upon the mortgagor, who was the owner of the mortgaged premises, and had bought them himself. He had the whole estate. If anything was left it was no more than Mrs. Clark's right of dower. The mortgagors had been in gross default. Neither of them could or would pay the mortgage for the sake of redeeming a contingent life estate in one-third. They had previously shown that they would not do it to save the whole.

But the conclusive answer to this and all other objections is the want of any defence in the court below.

A plaintiff brings a bill in which he avers the material facts of his case truly, and prays for such relief as he thinks himself entitled to. The defendants do not deny the facts, nor show any reason why the decree asked for should not be made. They neither plead, nor demur, nor answer. They make no suggestion to the court against the demand. They admit it to be true, and well founded in law and equity. The decree, as asked for, is made, as all parties must have expected and intended that it should be. It stands for nearly five years, no review of it being asked for; no offer to give the plaintiff his money, or to pay him for his improvements, or to reimburse his other outlays. But when the five years are nearly expired—when twenty days only are left—an

appeal is taken; and when the case comes here, a reversal is expected, on grounds never before made known. The decree is alleged to be wrong, because a certain record, in another suit, which was not produced, might have given the defendants a technical advantage, if it had been produced, and because the form of the decree might, possibly, have been different, if the defendants had condescended to let the court know that they wished it to be different.

3. Another argument is founded on this: *That the court pronounced its decree without taking any proofs.*

We have already said that Clark and wife made no answer. Few's answer denied no fact asserted in the bill, but referred to the deed of trust which the bill also referred to. There was no replication, but after a decree *pro confesso* against two of the defendants, the cause was heard on bill and answer between the plaintiff and Few. It seems to be believed by our adversaries that the plaintiff was bound to prove by evidence taken before an examiner that the facts not denied by the answer were true. If the contrary be not the rule, then there is no rule of practice or pleading known to our system of equity jurisprudence.

We insist that where a defendant makes no answer to a bill in equity or makes an answer which exhibits no defence, he admits not only the facts but the right of the plaintiff to the relief he prays for, and consequently a decree in accordance with the prayer is to be taken as made with the consent of the parties, and not open to be impugned or questioned in the appellate court.

J. S. BLACK,
for Appellee.

IN THE SUPREME COURT
OF THE UNITED STATES.

No. 120.

JEREMIAH CLARK,
FLORINDA CLARK, and
SAMUEL F. FEW,

vs.

WILLIAM S. REYBURN.

ARGUMENT FOR APPELLANTS.

CLOUGH & WHEAT,
For Appellants.

IN THE SUPREME COURT

OF THE UNITED STATES.

JEREMIAH CLARK, FLORINDA CLARK and SAMUEL F. FEW,
Appellants,

vs.

WILLIAM S. REYBURN,
Appellee.

ARGUMENT FOR APPELLANTS.

On the 2d of January, 1862, William S. Reyburn filed in the office of the Clerk of the District Court of the United States for the District of Kansas, his Bill of Complaint (in Equity) against Florinda Clark, and Samuel F. Few, (the only defendants therein) therein in substance, (so far as affects the matter now,) saying: That Jeremiah Clerk, (husband of Florinda,) on the 30th of April, 1859, made his note payable to Reyburn, and that on the same day, to secure payment of that note, said Jeremiah and Florinda Clark, mortgaged block 22 (known as "Clark place") in Clark & Rees' Addition to the City of Leavenworth, as shown by the mortgage conveyance to said Reyburn, mentioned in said bill.

And that on the 25th of October, 1861, in a suit in Equity, then pending in said District Court, wherein Reyburn was Plaintiff, and the appellants herein were all Defendants—which action was then, [AT THE TIME OF THE RENDITION OF THE DECREE], dismissed as to Defendants JEREMIAH CLARK and Samuel F. Few—it was by said Court decreed that there was due Reyburn on said note and mortgage from Jeremiah Clark $8567.70.

And that said Court then rendered a decree of foreclosure against Jeremiah Clark of his interest in said property, and decreed a sale of his interest therein, to satisfy the amount due from him to Reyburn.

And that on the 21st of December, 1861, the Marshal of the U. S. for that District, sold such interest of said Jeremiah Clark in said property, to said Reyburn, for $7000. And that two days thereafter, said Marshal executed and delivered to Reyburn a deed of conveyance therefor.

And that the sum of $1884.25, after such sale, remained due on said note and mortgage, and that for the payment thereof, the interest of said Florinda Clark in said property stood charged, by virtue of said mortgage. And that Few's rights, as trustee, were inferior, &c., to those of Reyburn.

And in and by said bill, said Reyburn, in addition to the general prayer for relief, prayed that Florinda Clark and Samuel F. Few might be forever barred and foreclosed of any interest or claim to said property. And also asked for a subpœna to Florinda Clark and Samuel F. Few.

To which bill it appears that Florinda Clark [whether properly or not I suppose immaterial], on the 3d of March, 1862, filed the same answer she had previously made in the action mentioned in said Bill, and that Reyburn in his last suit, on the 24th of March, 1862, replied to said answer.

Few, both plead, and demurred to said Bill. Reyburn answered said plea, which plea was heard and disallowed on the 5th of May, 1862, and on the same day said demurrer was overruled. (See pages 13 and 14 of printed record.)

And thereupon (on said day), the Court gave Reyburn leave to amend his said Bill.

And afterwards, but on the same day, the Court gave Florinda Clark leave to withdraw said answer, and ordered the Clerk to deposit the same with the papers in the case in which it was originally filed. Florinda Clark made no further appearance in the case, or to said Bill, or to the so-called amended bill, afterwards filed.

The Court thereupon ruled Florinda Clark and Samuel F. Few to answer by the first Monday in June, 1862, WHICH RULE TO ANSWER was of course only applicable to the bill then on file.

See rules in Equity, 34 and 30.

And thereupon (afterwards but on the same day), Reyburn filed HIS BILL OF COMPLAINT in said District Court, against Jeremiah

Clark, Florinda Clark and Samuel F. Few, therein, after describing the before mentioned note and mortgage, so far as is now material in substance saying, " That on the 25th of October, 1861, in an action in Chancery, on said note and mortgage, then pending in said Court, wherein Reyburn was complainant, and said appellants were Defendants, which action was dismissed as to Florinda Clark and Samuel F. Few before decree, it was by the consideration of said Court, decreed that there was due from Jeremiah Clark to Reyburn on said note and mortgage $8567.70, and that said Jeremiah Clark be forever foreclosed and barred of any interest in and to said mortgaged premises, and every part thereof, and that the premises be sold under the direction of the Marshal in conformity with the decree, and the proceeds of sale be applied to the satisfaction of the sum so found due.

And that on the 21st of December, 1861, in pursuance of said decree, said Marshal sold said property to Reyburn, for $7,000.00, and two days thereafter conveyed the same by deed to Reyburn.

And that of the sum so found due $1884.25 was still due, and that for the payment thereof the interest of said Florinda Clark in said property stood charged.

And that Defendant Samuel F. Few under a deed of trust from Jeremiah Clark, and Florinda Clark to him in trust, dated January 12th, 1860, claimed to have the interest of a trustee in said property."

In and by which last mentioned bill, Reyburn prayed, that by a proper decree of that Court, Florinda Clark and Samuel F. Few might be foreclosed of any interest, right or claim in and to said mortgaged premises, and every part thereof, and that said Court would decree unto him such other and further relief as he might be entitled to, including his costs in that behalf—the prayer for process of subpœna, was only against Jeremiah Clark.

Neither Jeremiah Clark or Florinda Clark ever appeared to this bill, or in any of the aforesaid actions, after the same was filed.

On the 2d of June, 1862, Samuel F. Few filed his separate answer to said bill, therein among other things saying in substance: That about the 12th of January, 1860, Jeremiah Clark and Florinda Clark conveyed said property to him in trust for the use and benefit of Florinda Clark and the children of the bodies of said Jeremiah and Florinda Clark, in being, or to be born, and the legal heirs of said children, with certain other limitations in relation to the further descent thereof, and to the use, occupancy and disposition thereof;

and disclaimed any interest in the property otherwise than as such trustee.

There was not any replication filed to this answer.

Afterwards, on the 24th of October, 1862, said bill was taken as confessed against Jeremiah and Florinda Clark, and the case came on for hearing on the last mentioned bill and answer, having been set down for hearing thereon. Whereupon, on motion of the Solicitor for Reyburn, said Court then rendered a decree of strict foreclosure against said Jeremiah Clark, Florinda Clark, and Samuel F. Few, and each of them, thereby, from that time, foreclosing and barring them, and each of them, of any equity or right of redemption, claim, interest or demand in and to the aforesaid property and every part thereof—without giving to them, or any or either of them, any time in which to make payment of the mortgaged debt or any part thereof, and without giving Florinda Clark or Few any time in which to pay either the whole mortgage debt or the $1884.25 mentioned in the bill; and without any evidence or the finding of any fact against Few, either as to amount due, or as to any of the averments contained in the bill, and without ordering the payment of any sum of money, the Court NOT MAKING such *foreclosure* contingent on the non-payment of any sum of money. (See printed record page 19.)

And said Court then also adjudged and decreed, that Reyburn have and recover of said appellants his costs in that behalf expended, and that execution issue therefor.

Even if there were no other errors in the case, I submit that the Court erred in rendering a decree of strict foreclosure against all of the Appellants; certainly as to Florinda Clark and Few, without giving time, or fixing a day in which the Defendants below should pay, or be foreclosed; that at least Florinda Clark and Few were entitled to a certain time, which should have been fixed by the Court, in which to make payment, before the foreclosure should have been absolute against them.

The object of a bill for strict foreclosure, is to obtain a decree for the payment of the mortgage debt within a short time, to be fixed by the Court, or that in default thereof, the Defendants be barred and foreclosed of all rights and equity of redemption in the mort-

gaged premises, and his and their title thereto be extinguished, and vested in the mortgagee, without a sale thereof.

2 Barbour's Chancery Practice, 186 to 193.

2 Daniel's Chancery Pl. and Pr., 1016.

In cases of strict foreclosure, it seems to have been the practice for the Court to fix a time in which payment is to be made, and if payment is not made in the time fixed, or the time enlarged, (which is often done), then another order is made, making the foreclosure absolute, as is shown by the two authorities last cited, and cases in reference thereto collected in case of Perine vs. Dunn, 4 Johnson Ch. 140. See also, 2 VanSantvoord's Equity Practice, 121–2.

And for cases on principle in point to the proposition that it was error in the Court to render a decree of strict foreclosure, without giving time in which to pay, &c. See

Strawn et al. vs. Cogswell, et al., 28 Illinois, 462.

Mills vs. Heeney et al., 35 Illinois, 173–4.

It appears to me that if the bill on which the case was heard, (on pages 14 and 15 of printed Record) was properly filed against all three of the appellants, then by filing the same, Reyburn waived the alleged foreclosure and sale against Jeremiah Clark mentioned in the bill. (Record, page 15.)

Perry vs. Barker, 13 Vesey, 198.

especially as there had not been any confirmation of the sale, Reyburn being at the time of filing said (the last) bill only a bidder, not a purchaser—being bidder in first case, and plaintiff in both cases;

2 Daniel's Ch. Pl. and Pr., 1271–2–3 and 1279.

which view of the law is strengthened by applying to the facts of this case the rule of Equity, that Florinda Clark and Few if desiring to redeem, would have had to pay the full amount of the mortgage debt, not merely the $1884.25.

The decree (Record, page 15) mentioned in the bill, did not bar, or in any manner affect, either Florinda Clark, or Few, any more

than as though it had not been rendered, (unless it had the effect of merging the mortgage in that decree.)

Pope vs. North, 33 Illinois, 440.
McArthur vs. Franklin, 16 Ohio S., 193.
Leonard vs. Admr. of Villars, 23 Illinois, 379.
Green vs. Dixon, 9 Wisconsin, 533.
Hodson vs. Treat, 7 Wisconsin, 263.
Vroom vs. Ditmas, 4 Paige, 526.
Bradley vs. Syder et al., 14 Illinois, 263.
Gage vs. Brewster et al., 31 New York, 218.
Anson vs. Anson, 20 Iowa, 58.

And these cases in Wisconsin, Ohio and the 14th Illinois, show that it is immaterial why or wherefore the conveyance mentioned in the answer of Few was made.

(See last paragraph in syllabus on page 518, of 32 Illinois.)

And even if it were otherwise, there is nothing even in the most remote degree tending to impugn either the fairness or propriety of executing the deed of trust to Few; it was made after the mortgage was recorded, and subject to it; it did not in any manner injure or delay Reyburn. And there was no contract with Reyburn, express or implied on the part of the mortgagors that they would not convey the property by such a deed of trust as that mentioned in Few's answer, and they most clearly had a right to make such a deed. And if Reyburn desired to foreclose his mortgage, the record of this deed of trust showed him who to make Defendants with the original mortgagors, and when he commenced his first suit he made Few a party, thus showing that then so far as the present Appellants are concerned, he knew they ought all to be made Defendants. And knowing this, he commenced his first suit against the three Appellants, but evidently getting in a hurry, or being afraid of the issue of a trial of the facts set up in the answer of Florinda Clark, or for some other reason, what, is now entirely immaterial, dismissed his first action as to Few and Florinda Clark. (Any suggestion on the part of the defense here—that such dismissal was because of objections to the process in the first suit—is, I submit, somewhat absurd, particularly when the fact that Florinda Clark had answered in that first suit is shown by the record here; and even if such suggestion were correct in point of fact, that would only show that further process should have been

sued out against any who did not appear, instead of showing a reason for dismissing the first action.)

And as an additional reason why the Court erred in rendering a decree of strict foreclosure, I refer to the case of Chick et al. vs. Willetts, 2 Kansas, 385, where it is shown that mortgages in Kansas do not convey the legal title, but are mere liens, nothing more; and do not give the right of possession. And that the RIGHTS of the mortgagee (so far as affects this case) are confined to a right to have the land sold by a proceeding in Court. And that the rights of parties in foreclosure cases in the said U. S. District Court were the same as though the mortgage had been enforced in a State Court, see

Bronson vs. Kinzie, 1 Howard, 311, 321–2.
Ward vs. Chamberlin, 2 Black, 430.
Dexter vs. Arnold, 3 Sumner, 152.
Russell vs. Ely et al., 2 Black, 575.

A strict foreclosure is granted in England and such of the States as it can be had in, only because there the legal title to the land by virtue of the mortgage becomes vested in the MORTGAGEE, and the mortgagor, after condition broken, has only an equity of redemption. Whereas in Kansas, it is the reverse; the mortgagor retains the legal title and right of possession; and the mortgagee only has a lien. It will be noticed that the mortgage, the legal effect of which was passed on in the before cited case in 2 Kansas, 385, was made whilst the same laws, in relation to the effect thereof, were in force, as when the mortgage described in said bill was made anything in Mr. Stillings' brief in this case to the contrary notwithstanding; and in relation to real estate, this Court has, I believe, uniformly considered itself bound by decisions of the Supreme Court of the State where it is situated; and I submit that this right to have a sale, &c., of the property mortgaged is a property right, and not mere matter of remedy, which ought to have been respected by the District Court as to Florinda Clark and Few, (and also as to Jeremiah Clark, if Reyburn waived the proceedings in the action mentioned in his bill by prosecuting his last action.)

2 Black, 575.

The bill shows that there had been a previous suit between Reyburn as Plaintiff, and said Appellants as Defendants, in the same Court, for the same purpose. That before decree, (I understand from the record, AFTER the case was set for hearing, if it was set for

hearing the usual time before being heard, and of course it is now to be so presumed,) that case was dismissed (not however without prejudice) as to Florinda Clark and Few; and that the case then proceeded to decree of foreclosure and sale, against Jeremiah Clark. That thereby the note and mortgage were so merged in the decree as that no other action could be maintained thereon to foreclose the same mortgage, see

Mason vs. Eldred et al., 6 Wallace, 231.
Wayman et ux. vs. Cochrane, 35 Illinois, 152.
State Bank vs. Wilson et al., 4 Gilman, 57.
Erwin et al. vs. Lynn et al., 16 Ohio S, 539.

The three cases last cited are referred to on account of their more direct bearing on this case than most cases on the merger question.

I submit that even if the first decree was not a bar to the last suit because of the merger, as to ALL of the appellants, that it was at least as to Jeremiah Clark, (if the proceedings in the first suit were not thereby waived,) and as that matter as against Reyburn is shown as an admission of his sufficient for this suit, by his statements about it in his bill, of course, as the bill showed it, it was not necessary for those for whom it is a defense to affirmatively set it up.

If the cases above cited about MERGER are, or if a similar principle, is applicable to this case, then of course there can be no doubt but that such first alleged decree was a bar to any other foreclosure proceeding on the same mortgage against not only Jeremiah Clark, but also to any against Florinda Clark or Samuel F. Few.

And for an additional reason why such so alleged decree should be held a bar to any other foreclosure suit by Reyburn on the same mortgage against Florinda Clark and Few, we refer to the fact that AS ALLEGED BY REYBURN IN HIS BILL, the first action was dismissed as to Florinda Clark and Few, before decree on same day on which the alleged foreclosure was rendered against Jeremiah Clark—by mentioning the time when the action was dismissed as being BEFORE DECREE, but on the same day on which the decree against Jeremiah was rendered, it is but reasonable to presume, for the purposes of this case, that such dismissal was made, not only after the case had been set down for hearing, but after hearing, in either of which cases, I submit such first action would be a bar to said bill and the relief therein prayed for.

Equity rule No. 90, and 117th order of May, 1845, referred to in 1st Daniel's Ch. Pl., and Pr. 684 and 799 (3d edition.)

Reyburn does not pretend that such dismissal was without prejudice. As he shows the bar in his bill according to that order, of course he must show something to rid himself of its effect, or the bar stands good against him, and of course it is not necessary for a defendant to plead a defense shown by the bill.

And I submit that this claim, that the alleged foreclosure was a bar to the said bill, is not impugned by those cases, which show that a person holding under a mortgage, which has been foreclosed against only some of those as to whom it might have been foreclosed, leaving other persons unaffected by it, can still, in suits prosecuted by such persons, claim under it, as to those persons against whom it was not foreclosed, as an unforeclosed mortgage. This he might be permitted to do for manyreasons, of equity and justice, without being permitted to again call on the Courts AFFIRMATIVELY to foreclose his mortgage.

There was not any replication filed to the answer of Few, (on pages 17 and 18 of the Record) wherefore the same stood and was to be taken as true.

Leeds vs. Marine Ins. Co., 2 Wheaton, 380.

The decree (on page 19 of the Record) complained of, was rendered on a hearing of the cause, on bill and answer of Few, WITHOUT PROOF. Therefore it was erroneous as to Few, because such matters alleged in the bill as were not admitted in his answer, (and he did not therein admit any part of Plaintiff's case), should have been proven as against him, (if the case could be heard without a replication), as he did not admit the truth thereof by failing to deny the same.

Young vs. Grundy, 6 Cranch, 51.
Trenchard vs. Warner, 18 Illinois, 142.
Wilson vs. Kenney, 14 Illinois, 27.
DeWolf et al. vs. Long, 2 Gilman, 679.

Few's answer was filed June 2, 1862. Reyburn did not except thereto—four rule days elapsed between the day on which it was filed and the time of the rendition of the decree complained of—wherefore because a general replication thereto was not filed, on the next succeeding rule day, after said answer was filed, Few was entitled to an order, as of course, for a dismissal of the suit.

Equity rule No. 66.

And I think I may correctly say that as a matter of course Reyburn ought not to be permitted to retain his decree, obtained when Few, whose answer represented both his and Mrs. Clark's interest, (he being her, as well as her children's trustee), was entitled to have the suit dismissed, and that therefore the Court erred in rendering its decree, of the 24th October, 1862.

That the Court erred in rendering decree of foreclosure (at least as to Few), without the children IN BEING, mentioned in the answer of Few, being parties to the suit, see

Shields vs. Barrow, 17 Howard, 130.
Leonard vs. Adm'r of Villars, 23 Illinois, 379.
Sec. 3 of chapter 5, 1st Daniel's Ch. Pl. and Pr. (3d edition), and ibid, 285.
Fell vs. Brown, 2 Bro., Ch. R. 276.
Pratt vs. Oliver, 2 McLean, 267.
Nodine vs. Greenfield, 7 Paige, 544.

Equity rules 47, 48, 49, 50 and 51, as they do not refer to such a trust as that shown by Few's answer, do not afford any answer to this objection.

On the 5th of May, 1862, Reyburn had leave of Court to amend his first above mentioned bill, (and inasmuch as he therein averred that the first suit was dismissed as to Jeremiah Clark and Samuel F. Few, and then, that he had a decree against Jeremiah, it needed amendment even in the most favorable view that can be taken of the case for Reyburn.)

Now, under mere leave to amend a pleading, I believe it is not usually understood in practice, that a new party can be added; and I claim that Reyburn did not comply with the leave given him; that to have done so, he should have filed an amendment to his bill against only Florinda Clark and Samuel F. Few.

And that by filing the bill—found on pages 14 and 15 of the Record herein—against them and Jeremiah Clark, that he thereby made and commenced an entirely new suit, and should have subpœnaed all of the Defendants in that case, (I do not claim it was necessary for him to subpœna Florinda and Few, if it can be considered an amended bill in the same case in which the leave to amend was given), and having failed to do so, that Florinda Clark was not before the Court in the case in which the decree was rendered. And that even if the bill last filed can be considered as filed in the case in which the leave to amend was given, that she could not be considered

in default until after notice of the filing thereof had been given her, and such notice was not given her.

The leave given Reyburn, was "to amend his bill in this (meaning that) cause," (see page 14 of the Record)—amendments to a bill on file are made in two ways, one by interlineation thereof, which method requires special leave, as thereby a Record is mutilated; the other and better way is to file a paper referring to the bill, stating what amendments are thereby made. I believe these two to be the only ways a bill can be amended; when a party has leave to do so, he may file an amended bill, but of course that is not an amendment of his bill previously filed—when a plaintiff desires to make new parties defendant, I submit he should first have leave to do so, and that it cannot properly be done without such leave, at least not under *leave to amend his bill.*

It may be claimed that as to Jeremiah Clark, the last suit was in effect only a proceeding to confirm the alleged sale. If such claim shall be made, in answer thereto, I suggest that even if a sale had been made as stated in the bill, that would not give Reyburn another cause of action against Jeremiah, it would only—if properly made, which would be determined by an inspection of the Marshal's return —be a reason why a motion for an interlocutory order, i. e. an order confirming the sale, should be made in the first case; matters which should be determined in that way in a case already tried, cannot be made the subject matter for another suit.

A confirmation of a sale would be one thing; a decree barring and foreclosing a party a very different thing; besides the bill did not show whether the Marshal complied with the first decree in making the sale or not; that could only be determined by an examination of his return of sale, which must appear regular; it is not enough for him to return he had sold, he must show how, when and where, what notice he gave, and a compliance with all the requirements of the law in relation to that matter, according to the usual practice in relation to such a matter. If a Marshal had merely reported to the Court he had sold the property for $7000 and made a deed, his sale would not, on motion, have been confirmed; he would have been required to show a compliance with the law, &c., before the Court would approve his acts; it would be of very little use for Equity to prescribe as a rule that a bidder was not a purchaser until confirmation, and that there should be an examination by the Court of the Marshal's proceedings, to ascertain whether he had complied, in the matter of the sale, with the requirements of the law before

confirming the same, if on the bare statement that a sale had been made of the property for so much, a CONFIRMATION could be had in a different suit, with different parties, prosecuted ostensibly for a purpose other than that of procuring such confirmation.

One of the honorable and learned counsel for the Appellee (Judge Black,) has seen proper to make the following statement in his brief filed in this case, viz:

"The decree stood undisturbed and without complaint for *five* "*years less twenty days*, when this appeal was taken. By dragging "their creditor a thousand miles to defend his right, they vex, har- "rass, and delay him, and put him to an expense about equal to the "remainder of his debt, 'which, if not victory, is at least revenge.'"

It is scarcely necessary for me to say, that the above statement of the honorable gentleman is irrelevant in all its parts, and under the circumstances, I suggest, indiscretely made.

The honorable Court will bear me witness, that in my first argument, filed in this case, I carefully avoided impertinent allusions to any action of the Appellee, and did not directly or indirectly refer to the animus of his proceedings, or to the hardships to which my clients were exposed in consequence thereof. And in view of the above, and to place my clients fairly upon the record, in reply, I hope to be excused for stating that on the opening of the war of the rebellion, one of my clients, Jeremiah Clark, was possessed of a fine estate in landed property, that unfortunately he was at the same time to some extent pecuniarily involved. That owing to the rapid depreciation in value of such estate, he became incapacitated from meeting his liabilities.

That his creditors (one of the principal of whom was the Appellee in this case) pressed suit against him with no lack of zeal, and as a consequence most of his large property was sacrificed at a small part of its intrinsic value.

Of this we cannot and do not complain. As a man must pay his debts when falling due, or abide by the consequences, even when the causes which involve him in ruin, cannot be foreseen, or if apprehended, are beyond his control. But when a creditor would foreclose a mortgage or take any other legal proceedings, he also must of course pursue such remedies as the law gives him, in the manner and as prescribed by law. And even if Reyburn, on the 5th of May, 1862, properly filed his so-called amended bill of complaint, I submit that the utmost risk that either of the Defendants incurred by making default, or failing to answer thereto, was that of having a decree

rendered against them to the effect, that unless, within some time fixed by the Court, they should pay to Reyburn some sum of money, the amount thereof determined by the Court, they should be barred, foreclosed, etc. And I submit, that even if all the other points I have made are bad, that each of the Appellants had a most undoubted right according to the rules, practice and precedents of Courts of Chancery to rely on having some time in which to pay such sum of money, after the Court should have determined how much they ought to pay.

Reyburn voluntarily dismissed his first suit as to Florinda Clark and Few, and then proceeded and took a foreclosure and sale as against Jeremiah Clark; and afterwards, on the 5th of May, 1862, files his last amended bill, on which he took the decree complained of, not therein asking to have the Appellants, or any of them, decreed to pay him any sum of money, or be foreclosed, etc., nor asking to have any sum of money found due him, but on the contrary framed his bill, took the decree sought to be reversed, on the pretence and claim, that neither Florinda Clark or Samuel F. Few had any right whatever in the premises, and the Court below must have taken this view of the case, else why would it have rendered such a before unheard of decree as that found on page 19 of the printed record of this case. Florinda Clark was one of the original mortgagors, and had an interest under the deed of trust. How, or why she had forfeited, or lost her right to redeem the premises from the mortgage, is more than I can comprehend.

Here a decree was rendered which can only be sustained on an assumption that she had no right to redeem the premises. I think the cases I have above cited, as well as the commonest moral perception of equity, will teach us that she did not part with all her interest in the premises, by executing the mortgage or the deed of trust to Few, as she was a beneficiary therein, (and so far as any actual interest was conveyed to Few, he stood in her place.)

The jurisdiction of Courts of Chancery in relation to strict foreclosure of mortgage was founded and is to prevent forfeitures by non-payment upon the day fixed, and also to determine the amount, and fix the time within which the mortgagors and those claiming under them must pay, or be foreclosed, &c. And then, when such time elapses and payment has not been made, to render a decree of absolute foreclosure. But here we have a case where one of the mortgagors, and a person claiming under both of them have, by a new jurisdiction never before known to have been assumed by any

Court of Chancery, contrary to the plainest principles of equity, been barred of their rights in the premises in favor of a mortgagee, on a bill not prosecuted for the purpose a bill on a mortgage usually is, but on the claim that they, Florinda and Few, were not entitled to redeem. Thus turning a Court of Chancery into a tribunal for the strict enforcement of a forfeiture, a precedent for which cannot be found. And notwithstanding this, we find the quotation above made in a brief for Reyburn to support such decree.

He thus enforced his claim, that Florinda had forfeited her rights, with an iron rule heretofore unknown to Courts of Chancery, and not recognized as law for many ages, took his decree, at a time when, according to the rules of this Court, Few, who represented both Mrs. Clark and himself, had a right to have the bill dismissed; and yet complains about the 20 days still left when this proceeding was commenced, in which any of the Appellants injured by that decree could complain. The five years in which such proceeding as this could be commenced was fixed by act of Congress, and under that act the errors of the Court below are just as fatal on the last day of the five years as on the first.

Why Mr. Black, in his brief, says "Few pleaded a false plea," is to me incomprehensible. Reyburn (see page 13, of printed record), admitted the material allegation of the plea, to wit, that no subpœna had been issued against Jeremiah Clark after the bill therein mentioned had been filed. But that plea, the demurrer and the answer of Florinda Clark, made to the bill of Reyburn filed on the 2d of January, 1862, as well as the reason, if any, why Florinda Clark filed that answer to that bill, are now immaterial. Why that answer, which belonged in the first case, was re-filed to the bill filed on the 2d of January, is to me unknown, as I was not then in that case; it was probably in pursuance of Reyburn's consent, and leave of Court, which suggestion I make because I find that Reyburn replied thereto. See page 10, printed record. It is true the firm name of Rees & Wheat is to that answer, but they filed it in the first suit. This matter about that answer is also immaterial, and I should not have mentioned it but for the remark of Mr. Black about its being *sent back*.

In conclusion, permit me to solicit an early hearing of this case. Appellants took their appeal within the time allowed them by law, and relying upon the first paragraph of rule No. 30, of this Court, that this cause will be heard when reached, I shall probably not be present when this case is again reached on the call of the docket of this

Court. But in anticipation, for reasons known to all who take the trouble to investigate the title to the premises, that further applications for postponement will be made, I desire to be understood as protesting against any further delay of the hearing of this cause, under any pretended or real excuse whatever. Appellee has had abundant time to prepare for the hearing.

J. B. Wheat

September 21, 1869. *Counsel for Appellants.*